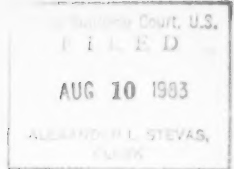


NO. 82-6950



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

ROBERT SANTIAGO, Appellant

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA
(PENNSYLVANIA SUPREME COURT NO. 80-3-653)

MOTION OF APPELLEE TO DISMISS OR AFFIRM

ERIC B. HENSON
Deputy District Attorney
(Counsel of Record)
STEVEN J. COOPERSTEIN
Assistant District Attorney
EDWARD G. RENDELL
District Attorney
Philadelphia County

District Attorney's Office
1300 Chestnut Street
Philadelphia, Pa. 19107
(215) 875-6010

August 12, 1983

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MOTION TO DISMISS OR AFFIRM

Appellee, the Commonwealth of Pennsylvania, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal or, in the alternative, to affirm the order of the Supreme Court of Pennsylvania, affirming appellant's judgments of sentence, on the ground that the question is so insubstantial as not to warrant further argument.

QUESTION PRESENTED

Should this Court dismiss this appeal or, in the alternative, affirm an order of the Pennsylvania Supreme Court, upholding the Pennsylvania felony-murder rule as applied to defendant's convictions for a triple arson-murder?

STATEMENT OF THE CASE

Defendant Robert Santiago appeals from the April 27, 1983, order of the Supreme Court of Pennsylvania, affirming the judgments of sentence imposed upon him for three counts of murder and one count of arson. The factual and procedural history of this appeal is as follows.

Defendant was tried and convicted for arson and for the triple murders of Ocie Bell Stokes, aged forty-two years, and her two young daughters, Rochelle, aged fifteen, and Nellie, aged thirteen. The defendant killed the victims by burning their home at 919 West Butler Street in Philadelphia during the early morning hours of January 23, 1979. The Stokes family had lived at this address for eleven years. The only person to escape, James Stokes, Ocie's husband and the children's father, was forced to stand by helplessly while his house and family perished in the flames (N.T. 2.91-2.98). Defendant's fire also destroyed several nearby residences and left others homeless (N.T. 2.19-2.20, 2.30-2.33, 2.139-2.144).

Officer John Thompson testified that at approximately 3:00 a.m., on the morning of January 23, 1979, he noticed flames and smoke in the 900 block of West Butler Street. When Officer Thompson went there, he encountered Mr. Stokes, whose family was trapped inside one of the burning buildings. Access from the front of the homes was impossible due to the rapidly spreading fire and intense heat (N.T. 2.18-2.28). Fire department personnel arrived within two minutes, but the fire, which went to two alarms, was not brought under control until 3:25 a.m. (N.T. 2.135-2.138). The charred bodies of the three victims were later found in the upstairs middle bedroom at 919 West Butler Street (N.T. 2.141-2.142).

Lt. John Quinn, an Assistant Fire Marshall (N.T. 2.133), testified that he found the victims, and that his investigation revealed that the fire was of an incendiary origin. The fire was

set just inside the porch area of the Stokes home at 919 West Butler Street; it was accelerated by a substantial amount of flammable liquid, and the liquid was poured into the area of the mail slot and then ignited with an open flame (N.T. 2.142-2.146, 2.155-2.162).

On the evening before the fire, defendant witnessed an argument involving Valda Gibbons, the sister of defendant's former girlfriend, and Rochelle Stokes, one of the victims (N.T. 2.37-2.40, 2.49, 2.71-2.73). Although the argument did not directly involve him, defendant disliked Rochelle, and he threatened that someone would "get" her because she was always minding defendant's business (N.T. 2.75-2.76). Defendant made good his threat. Rochelle, her mother, and her younger sister died in a fire early the next morning. As the fire trucks were arriving, defendant was heard knocking on the door of the Gibbons home and calling for his former girlfriend, Cassandra ("Sandra") Gibbons (N.T. 2.52-2.53, 2.58). When no one answered the door, he left. Several minutes later, someone else came to tell the Gibbons youngsters that Rochelle's house was on fire (N.T. 2.54-2.55).

Defendant was arrested pursuant to a warrant on January 25, 1979. After waiving his Miranda rights, defendant gave a full statement in which he admitted that he poured gasoline into the mail slot of Rochelle's home; that he lit the gasoline with a match; and that he then went to Cassandra Gibbons' house where he banged on the door, but no one let him in. Defendant also admitted that he set the fire in order to "get even" with Rochelle (N.T. 3.23-3.29).

The Honorable Theodore B. Smith, Jr., denied defendant's motion to suppress his inculpatory statement. The case then proceeded to a bench trial before the Honorable Armand Della Porta who, after hearing the Commonwealth's uncontradicted evidence, adjudged defendant guilty of three counts of second degree murder, arson, and causing and risking a catastrophe (Information Nos.

552, 553, 556, 561 and 563, February Session, 1979). Post-verdict motions were subsequently denied, and defendant was sentenced to three concurrent terms of life imprisonment for the murders of Ocie, Rochelle, and Nellie Stokes, and a concurrent term of ten to twenty years for arson. Sentence was suspended on the remaining charge.

Defendant appealed the judgments of sentence to the Supreme Court of Pennsylvania, pursuant to 42 Pa.C.S.A. §722. The Court affirmed by per curiam order dated April 27, 1983. Commonwealth v. Robert Santiago, 458 A.2d 939 (Pa. 1983).

This appeal, which defendant asserts is pursuant to 28 U.S.C. §1257(2), followed. Defendant renews his claim, that was rejected by the Pennsylvania courts, that 18 Pa.C.S.A. §2502(b), which classifies as murder in the second degree a homicide committed in the perpetration of certain enumerated felonies, denies him due process of law in violation of the fourteenth amendment to the United States Constitution.

ARGUMENT

Defendant claims that the Pennsylvania criminal homicide statute, in perpetuating the felony-murder rule, establishes a presumption of malice that violates his due process rights. 18 Pa.C.S.A. §2502(b) (a copy of the entire Pennsylvania criminal homicide statute is attached as Exhibit A). The Pennsylvania courts correctly rejected this claim that the felony-murder rule violates the fourteenth amendment.

Defendant alleges that Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450 (1979) invalidated the felony-murder rule. This Court did not in Sandstrom, however, enter a constitutional ukase against this venerable doctrine which relieves the state of none of its burden of proof. Whether homicides committed in perpetration of felonies should be punished as murders is a policy question of statutory or decisional law; this question does not implicate the constitutional burden of proof in criminal cases.

Sandstrom forbids the state to shift the burden of proof of any necessary element of an offense to the defendant. Sandstrom was charged with "deliberate homicide," which included as an element that the accused acted purposely or knowingly. The trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Id. at 513, 2453. This Court held that the trial court's instruction violated Sandstrom's due process rights because to presume conclusively from a defendant's acts the intent element necessary to sustain a conviction for deliberate homicide deprives the accused of his presumption of innocence and places on him a burden of proof.

Pennsylvania's felony-murder rule does not similarly deprive an accused of his presumption of innocence or place on him a burden of proof. Murder is defined by Pennsylvania case law as an unlawful killing with malice. Commonwealth v. Weinstein, 451 A.2d 1344

(Pa. 1982); Commonwealth v. Young, 494 Pa. 224, 431 A.2d 230 (1981). The felony-murder doctrine is a means of defining malice. It is a judicial judgment that: ". . . the willingness to participate in conduct amounting to a felony exhibited the recklessness of consequences, the callous disregard and the hardness of heart which evidenced a malicious state of mind." Commonwealth v. Allen, 475 Pa. 165, 169, 379 A.2d 1335, 1336-1337 (1977). Far from establishing a presumption of intent, the felony-murder doctrine provides that malice is shown only when the Commonwealth proves beyond a reasonable doubt that the accused intentionally participated in a specific felony during which the homicide occurred. Commonwealth v. Allen, *supra*; Commonwealth v. Yuknavich, 448 Pa. 502, 295 A.2d 290 (1972) (same statutory scheme under prior law, 18 P.S. (former) §4701). Thus, the felony-murder doctrine is a definition of malice; it does not involve a presumption that shifts from the prosecution its burden of proof. The felony-murder doctrine does not violate an accused's due process rights.

Moreover, the felony-murder rule is constitutional even if it is viewed as establishing an evidentiary presumption. An evidentiary presumption in a criminal case is constitutional if ". . . it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. United States, 395 U.S. 6, 36, 89 S. Ct. 1532, 1548 (1969). See also County Court of Ulster County v. Allen, 442 U.S. 140, 99 S. Ct. 2213 (1979). Here, indisputably, proof of a person's intent to engage in the dangerous felonies enumerated in the statute, *i.e.*, robbery, rape, involuntary deviate sexual intercourse, arson, burglary and kidnapping, 18 Pa.C.S.A. §2502(d), meets this more likely than not standard. Such proof unmistakably gives rise to the inference that the actor had the recklessness or hardness of heart necessary to establish malice. Thus, the "presumed fact," malice, clearly

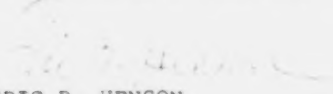
is more likely than not to stem from the "proved fact," commission of a dangerous felony.

The Pennsylvania courts correctly rejected defendant's claim. The question presented is so insubstantial as not to warrant further argument.

CONCLUSION

For the reasons stated herein, this appeal should be dismissed or affirmed.

Respectfully submitted,

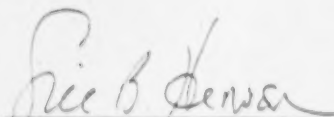

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COMMONWEALTH OF PENNSYLVANIA, : OCTOBER TERM, 1983
Appellee :
v. :
ROBERT SANTIAGO, Appellant : NO. 82-6950

CERTIFICATION OF SERVICE

I, ERIC B. HENSON, Counsel for Appellee, hereby certify that I have served three (3) copies of this Motion of Appellee to Dismiss or Affirm on counsel for appellant, William P. James, Esquire, 915 Robinson Building, 42 South 15th Street, Philadelphia, Pennsylvania 19102, by first class mail, postage prepaid, on August 9, 1983.



ERIC B. HENSON, Esquire
Deputy District Attorney
1300 Chestnut Street
Philadelphia, Pa. 19107

Sworn to and subscribed :
before me this 9th day :
of August, 1983, A.D. :


NOTARY PUBLIC

My Commission Expires:

9/19/83

JOYCE M. NICHOLAS
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 19, 1983

CHAPTER 25

CRIMINAL HOMICIDE

- Sec.
2501. Criminal homicide.
2502. Murder.
2503. Voluntary manslaughter.
2504. Involuntary manslaughter.
2505. Causing or aiding suicide.

§ 2501. Criminal homicide

(a) **Offense defined.**—A person is guilty of criminal homicide if he intentionally, knowingly, recklessly or negligently causes the death of another human being.

(b) **Classification.**—Criminal homicide shall be classified as murder, voluntary manslaughter, or involuntary manslaughter.

1972, Dec. 6, P.L. —, No. 334, § 1, eff. June 6, 1973.

Historical Note

Model Penal Code:

This section is similar to section 210.1 of the Model Penal Code.

Library References

Homicide §251.
C.J.S. Homicide § 1; et seq.

P.L.E. Homicide § 1.

Notes of Decisions

1. Arson-murder. In order to convict defendant of arson-murder, jury must find beyond reasonable doubt that defendant willfully caused fire which caused death. Com. v. May, 391 A.2d 368, Sup. 1973.

§ 2502. Murder

(a) **Murder of the first degree.**—A criminal homicide constitutes murder of the first degree when it is committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate, and premeditated killing. A criminal homicide constitutes murder of the first degree if the actor is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary, or kidnapping.

(b) **Murder of the second degree.**—All other kinds of murder shall be murder of the second degree. Murder of the second degree is a felony of the first degree.

1972, Dec. 6, P.L. —, No. 334, § 1, eff. June 6, 1973.

with two Judges concurring, one Judge concurring specially, and one Judge concurring in result.) *Com. v. Garcia*, 373 A.2d 1189, 474 Pa. 449, 1977.

Chapter 33 of Crimes Code governing homicide creates one major homicide offense, that of criminal homicide, and the several types of homicide, namely, murder of any of the three named degrees and voluntary and involuntary manslaughter, are constituent subsidiary offenses within the single major offense; all grades of unlawful killing thus have

been made lesser included offenses of the overall crime of criminal homicide. (Per *Pomeroy, J.*, with one Judge concurring and three Judges concurring specially.) *Com. v. Polimeni*, 373 A.2d 1189, 474 Pa. 430, 1977.

Differences between classifications of criminal homicide are largely a function of the state of mind of perpetrator. (Per *Pomeroy, J.*, with one Judge concurring and three Judges concurring specially.) *Id.*

§ 2502. Murder

(a) Murder of the first degree.—A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) Murder of the second degree.—A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.

(c) Murder of the third degree.—All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.

(d) Definitions.—As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Fireman." Includes any employee or member of a municipal fire department or volunteer fire company.

"Hijacking." Any unlawful or unauthorized seizure or exercise of control, by force or violence or threat of force or violence.

"Intentional killing." Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.

"Perpetration of a felony." The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

"Principal." A person who is the actor or perpetrator of the crime. As amended 1974, March 26, P.L. 213, No. 46, § 4, *imd.* effective; 1978, April 28, P.L. 84, No. 39, § 1, effective in 60 days.

Section 5 of Act 1974, March 26, No. 46, effective immediately, provides as follows: "If any subparagraph, paragraph, or subsection of section 2502 of the Crimes Code, as amended by this act, (section 2502 of this title) or any other provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other subparagraphs, paragraphs, subsections, provisions or applications of the act which can be given effect without the invalid subparagraph, paragraph, subsection, provision or application, and to this end the provisions of this act are declared to be severable."

1974 Amendment: Made substantial changes in subsections (a) and (b), and added new subsections (c) and (d).

1978 Amendment: In subsection (b), substituted words "it is committed" for words "the death of the victim occurred."

Cross References

Crime victim's compensation board, see 71 P.S. § 150-7 et seq.

Homicide by vehicle, see 73 Pa.C.S.A. § 2732.

Intoxication or drugged condition reducing degree of murder, see § 303 of this title.

Mental health procedures, see 50 P.S. § 7304.

Sentences for second degree murder, see section 1102 of this title.

Sentencing for murder, see 41 Pa.C.S.A. § 2711.

Law Review Commentaries

Battered spouse syndrome as a defense to a homicide charge under this chapter. (1980-41) 28 Vill.L.Rev. 104.

Suggested standard jury instructions on criminal homicide, Arthur A. Murphy, (1980) 44 Dick.L.Rev. 1.

Use of psychiatric testimony in homicide trial. (1973) 47 Temple L.Q. 184.

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§ 2503. Voluntary manslaughter

(a) **General rule.**—A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

- (1) the individual killed; or
- (2) another whom the actor endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

(b) **Unreasonable belief killing justifiable.**—A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title, but his belief is unreasonable.

(c) **Grading.**—Voluntary manslaughter is a felony of the second degree.

1972, Dec. 6, P.L. —, No. 334, § 1, eff. June 6, 1973.

Historical Note

Prior Laws:

1929, June 24, P.L. 672, § 702 (18 P.S. § 4703)

Cross References

Appeal, see 19 P.S. §§ 1180, 1187 and 1264.
 Classes of offenses, see section 106 of this title.
 Divorce, grounds, see 23 P.S. § 10.
 Indictment, manslaughter, see 19 P.S. § 351.
 Jurisdiction of offense, see 17 P.S. §§ 391 and 694.
 Penalties, see section 1101 et seq. of this title.
 Serious provocation, see section 2301 of this title.

Library References

Homicide § 22.
 C.J.S. Homicide § 40 et seq.

P.L.E. Homicide § 32

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which it was rendered, new trial must be denied. *Com. v. Noto*, 25 Lack, 203, 1923.

29. Sentence and punishment

Sentence of five to ten years' imprisonment and fine of \$100 was within statutory limits for crime of voluntary manslaughter. *Com. v. Person*, 450 Pa. 1, 297 A.2d 460, Sup.1972.

Manslaughter is a noncapital offense and cannot be punished by death. *Com. ex rel. Wilson v. Banmiller*, 143 A.2d 687, 393 Pa. 530, 1968.

On conviction of unlawful manufacture and possession of intoxicating liquor and of manslaughter resulting from illegal operation of still, it was proper to sentence defendants separately for each offense. *Com. v. Mango*, 101 Pa.Super. 385, 1931.

A person convicted of voluntary manslaughter might be sentenced to the state penitentiary or the county prison in the discretion of the court. *Com. v. Ferguson*, 34 Del.Co. 162, 1947.

Where a person convicted of voluntary manslaughter had been sentenced to the state penitentiary the court might amend the sentence to imprisonment in the county jail. *Id.*

Courts of county have option of sentencing prisoner convicted of voluntary manslaughter to county jail or to state penitentiary. *Com. v. Primes*, 25 Del.Co. 133, 1934.

30. Review

Defendant could not raise on appeal failure of trial court to instruct concerning effect of intoxication on finding of passion where he failed to except to that portion of charge. *Com. v. Martin*, 269 A.2d 723, 440 Pa. 160, 1970.

Under an indictment charging murder and manslaughter, and evidence establishing murder in the first degree in the perpetration of a robbery, defendant could not complain of being convicted of manslaughter. *Com. v. Kellyon*, 122 A. 166, 278 Pa. 59, 1923.

§ 2504. Involuntary manslaughter

(a) General rule.—A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person.

(b) Grading.—Involuntary manslaughter is a misdemeanor of the first degree.

1972, Dec. 5, P.L. —, No. 334, § 1, eff. June 6, 1973.

Historical Note

Prior Laws:

1939, July 24, P.L. 472, § 702 (18 P.S. § 702).

Cross References

Appeal, see 10 P.S. §§ 1186, 1187 and 1264.

Bail, involuntary manslaughter by automobile, see 10 P.S. § 51; 23 P.S. § 2225.

Classes of offenses, see section 106 of this title.

Divorce, grounds, see 23 P.S. § 10.

Indictment for,

Involuntary manslaughter, see 10 P.S. § 352.

Manslaughter, see 10 P.S. § 351.

Jurisdiction of offense, see 17 P.S. §§ 391 and 494.

Penalties, see section 1101 et seq. of this title.

Serious provocation, see section 2301 of this title.